No. 14671

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

United States of America,

Appellant,

vs.

Genevieve Pierce, Carrie Pierce McCoy, Anna Pierce, Ruth Carmichael nee Urton, Marcus Pete, Jr., and Elizabeth Pete,

Appellees.

Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF FOR THE APPELLEES.

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Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF FOR THE APPELLEES.

Opinion Below.

The District Court's opinion is reported in 123 Fed. Supp. 554. Its findings of fact and conclusions of law are found in the Record at pages 126-143.

Jurisdiction.

The District Court had jurisdiction of this cause under 25 U. S. C. A., Section 345, as amended, and under 28 U. S. C. A., Sections 1353 and 2201.

This Court has jurisdiction on appeal under 28 U. S. C. A., Section 1291.

Statutes Involved.

The statutes involved are: The Act of August 15, 1894, as amended (28 Stat. 305; 31 Stat. 760; 36 Stat. 1167); and the Act of June 25, 1948, as amended (62 Stat. 964; 63 Stat. 105). These statutes are codified as 25 U. S. C. A., Section 345, and 28 U. S. C. A., Sections 1353 and 2201. These statutes are quoted at pages 3-5 of appellant's brief, hence need not be requoted here.

Statement.

The history of the litigation involving the efforts of the Agua Caliente Indians to secure allotments of land in severalty is briefly stated on page 5 of appellant's brief. This litigation began with the *St. Marie* case, filed in 1936, nearly ten years after the 1927 allotment proceedings had been concluded by H. E. Wadsworth, Special Allotting Agent. (24 Fed. Supp. 237.) No allotments to the Palm Springs Indians were ever made and approved by the Secretary of the Interior until 1949, and then only after a mandamus action had been filed by some fifteen members of the Band against the Secretary in the District Court for the District of Columbia. The judicial history of the efforts of these Indians to secure allotments of land in severalty will be found in the decisions of this Court. See *Arenas v. United States,* 158 F. 2d 730-758, where Judge Garrecht, speaking for the Court, set forth the applicable statutes, the failure of the Secretary to perform his duty in respect to allotments over a period of nearly thirty years, and of the Secretary's abortive efforts to induce Congress to permit him to withhold all lands of the Agua Caliente Band of Indians from allotment and to lease said lands as he might see fit. See, also, the decision of the Supreme Court in *Arenas v.*

United States, 322 U. S. 419. More recent decisions of this Court are found in *Arenas v. Preston,* 181 F. 2d 62, and in *United States v. Preston,* 202 F. 2d 740.

A few months after the filing of the mandamus action against the Secretary, as above mentioned, to wit, on July 21, 1948, a special allotting agent was formally appointed, and he was given instructions by the Commissioner of Indian Affairs on September 24, 1948, to proceed with the making of allotments to the members of said Band of Indians. [R. 127, 208-211.] On November 5, 1948, the allotting agent gave notice to all of the members of the Band to make and file with him their respective selections for allotment. On December 18, 1948, the appellees and 71 other members of said Band of Indians through one of their attorneys, to wit, Oliver O. Clark, filed their respective selections of lands for allotment in severalty with the allotting agent. The names of said Indians and the descriptions of the lands selected by them, respectively, are set forth in Exhibit "A" to the complaint [R. 17-19] which is entitled "Schedule of Allotment Selections by Allottees Agua Caliente Band of Mission Indians, Palm Springs, Californa, 1948." The selections set forth in said schedule were made by the adult members of the Band for themselves, respectively, and for their minor children; and in many instances after conferences, consultations and compromises between members of the Band who claimed and desired to select the same land for allotment in severalty The selections shown by said schedule, 74 in number, were agreed upon, were satisfactory to, and were approved in writing by more than two-thirds of all members of said Band of Indians and disapproved by none of them. [R. 6.] Four of the five members of the tribal committee also approved it.

The statement in appellant's brief, at page 8, that the selections shown in the schedule "were arbitrary selections made by the attorneys without the approval or consent of the individual Indians" is untrue and has no support in the record, except only that the answer of, or for, defendants Raymond Welmas, Richard Amado Miguel, and Georgianna Lorene McGlammary alleges that their parents or natural guardians had no authority to make selections for them, respectively.

In this connection appellant's brief states (p. 9):

> "These schedules together with the Clark schedule [Ex. 'A' to the complaint], were considered by the Bureau of Indian Affairs and the Department of the Interior [R. 217-231]. In February, 1949, the Department declined to approve the Clark schedule, approved Schudule No. 1 in its entirety, approved 19 selections on Schedule No. 2 which did not conflict with any selections on the Clark schedule, and held the remaining 27 selections in abeyance [R. 226-228]."

An appeal was taken to the Secretary of the Interior who, on February 1, 1950, affirmed the action of the allotting agent in all respects. After exhausting available administrative remedies on July 10, 1950, this action was filed by seven of the Indians whose selections had been made and filed and disallowed in whole or in part.

The record shows that as to each of the plaintiffs some of his or her selections, as shown by Exhibit "A" to the complaint, were not in conflict with the selections made by the other members of the Band, or by any or either of them. As to the selections made by appellees the judg-

ment shows that their non-conflicting selections are known and described as follows:

Genevieve Pierce. B selection (5 acres of irrigable land) S½ NE¼ SE¼ SE¼ Sec. 22, T 4 S, R 4 E.

Carrie Pierce McCoy. A selection (2 acres) Block 44, Sec. 14, T 4 S, R 4 E; B Selection (5 acres irrigable land) S½ SE¼ SE¼ SE¼ Sec. 22, T 4 S, R 4 E.

Anna Pierce. A Selection (2 acres) Block 45, Sec. 14, T 4 S, R 4 E; B selection (5 acres irrigable land) N½ SE¼ SE¼ SE¼ Sec. 22, T 4 S, R 4 E. [See R. 146.]

Notwithstanding the undisputed fact that the plaintiffs herein, and each of them, had made non-conflicting selections of valuable tracts of land from the lands included in the Agua Caliente Reservation which were filed with the duly appointed allotting agent on December 18, 1948, the Bureau of Indian Affairs and the Secretary of the Interior failed and refused to approve said non-conflicting selections and to issue trust patents for the lands embraced in said selections to the Indian plaintiffs entitled thereto. Said officers also failed and refused to account for and to pay the rentals and income from the lands embraced in said non-conflicting selections to the respective plaintiffs entitled thereto and have persisted in said failure and refusal to this day as to rentals collected my them from December 18, 1948, to the dates of issuance of trust patents to said lands. Said officials have also failed and refused to apportion the waters of the Reservation among the members of the Band, or to include in trust patents issued to the members of the Band any provision that

the allottees, respectively, are entitled to just and proper shares of the reservation waters, or that the right thereto is appurtenant to the allotted land. Said officials have also failed and refused to equalize the value of the allotments made to the plaintiffs herein and other Indians, although it is conceded by them that "the plaintiffs and all other members of the tribe (are entitled) to such equalization of allotments." (App. Br. p. 33.) At the date of the filing of this action, to wit, on July 10, 1950, the foregoing failures and refusals existed and no action had been taken by the Bureau or by the Secretary to correct them. Indeed, the appellant expressly or tacitly admits that it has taken no action in respect to the matters mentioned, and in effect argues that all such matters are exclusively within the discretion of the Secretary and that the courts have no jurisdiction to adjudicate the rights of the Indians in respect to the income from allotted lands, or to adjudicate their rights in and to the waters of the reservation, or to equalize the allotments made to the several members of the Agua Caliente Band of Mission Indians. This argument, based on alleged want of jurisdiction, follows the familiar and now hackneyed pattern used in the *Lee Arenas* case which was filed in 1940, and it has as little merit now as it had then.

Pertinent Findings.

In respect to income from non-conflicting selections of land the District Court made findings of fact as follows:

> "That the plaintiffs have equitable title to the lands included in their respective non-conflicting selections and, as the owners of the full equitable title, plaintiffs have the equitable right to all of the income from such lands from the dates of their respective

selections; that it is the duty of the United States to account to each of the plaintiffs for the income received from his or her said lands from the dates of said non-conflicting selections. That the United States has not as yet made such accounting to plaintiffs or any of them." [Finding XXIII, R. 135.]

In respect to equalization of allotments the District Court found:

> "Plaintiffs (here appellees) * * * have not received their just and equitable share of the tribal lands in any of the allotment proceedings heretofore had for the benefit of the members of the Agua Caliente Band of Mission Indians; that each of them is entitled to total lands of approximately equal value to the lands allotted to each of the other members of said Band of Indians; that it is the duty of the Secretary of the Interior so to conduct further allotment proceedings that when the allotment and equalization process is completed each plaintiff will have been allotted land of as nearly equal value as practicable to the land allotted to each of the other members of said Band of Indians; that it is the duty of the Secretary of the Interior to equalize in value as nearly as practicable all the allotments made from the lands of the Agua Caliente Reservation." [Finding XXIV, R. 135-136.]

In respect to the waters of the Reservation the District Court found:

> "The evidence further shows that the Secretary has been remiss in performance of the duty imposed upon him by law, not only in the allotment of the land proper to the Agua Caliente Band of Mission Indians, but also by his failure even until now to allot water rights appurtenant thereto * * *." [Finding XX, R. 134.]

The brief of appellant does not challenge the sufficiency of the evidence to support the foregoing and other findings of the District Court. Moreover, the evidence fully supports said findings and appellant's brief tacitly, if not expressly, admits the sufficiency of the evidence in that respect.

Appellant's Contentions.

Appellant, United States of America, contends:

(1) That the District Court had no jurisdiction to declare appellees' rights to income, the equalization of allotments, or the apportionment of water;

(2) That even if the District Court had jurisdiction in respect to income, it erred in holding that plaintiffs were entitled to the income from lands included in their non-conflicting selections from the dates thereof; and

(3) That even if the District Court had jurisdiction, it erred in holding that it was the duty of the Secretary and of the United States to apportion or allot the waters of the Reservation among the members of the Band.

Primarily, appellant's attack upon the judgment below is based upon the alleged lack of jurisdiction of the District Court to make judicial declarations of the rights of the Indians to income from their duly selected lands, to the equalization of their allotments with other allotments, and to a fair and just share of the waters of the Reservation.

Appellees' contentions appear in the summary of the argument, *infra.*

Summary of Argument.

I.

The District Court had jurisdiction under 25 U. S. C. A., Section 345, to judicially declare the Indians' rights to allotments in severalty and to equalize said allotments, to declare the rights of the Indians to the income therefrom, and to declare that each Indian is entitled to a just share of the tribal waters on the Reservation and that such right is appurtenant to the land allotted to him.

The jurisdiction of the District Court under 25 U. S. C. A., Section 345 continues until the allotment process is completed.

The allotment process is not complete until the allottee receives lands of approximately equal value to the lands allotted to each other member of the tribe or Band.

The allotment process is not complete until the allottee receives the income from his allotment of lands from the date of his non-conflicting selection thereof.

The allotment process is not complete until the allottee's right to a just share of the tribal waters is secured and made appurtenant to his allotted land.

The jurisdiction of the District Court under 25 U. S. C. A., Section 345 is not limited merely to declaring an Indian's right to an allotment of selected lands, but extends to the giving of relief to an Indian who has been unlawfully denied or excluded from land lawfully selected by him for allotment.

To deny an Indian allottee the income from his land, or his right to an allotment in value equal to the allotments of other members of the Band, or his right to a just share of the waters of the Reservation would be the equivalent of denying or excluding him from his lawfully selected land. (25 U. S. C. A., Sec. 345.)

Under its general equitable jurisdiction, conferred by 25 U. S. C. A., Section 345, the District Court has power to grant the declaratory relief decreed as to water, income from the selected lands, and equalization of allotments.

II.

When land is lawfully selected for allotment by an Indian entitled thereto he becomes the equitable owner thereof as of the date of his selection and the land so selected is thereby severed from tribal ownership.

The Agua Caliente Band of Mission Indians is not a necessary party to this action, since its tribal ownership of the lands involved ceased when said lands were lawfully selected for allotment by the several allottees.

Equitable ownership of duly selected lands is in no wise dependent upon the issuance of a trust patent thereto.

This court held in the *Lee Arenas* case that his right to the lands selected by him in 1927 was that of an equitable owner and directed that the trust period begin to run from from May 9, 1927.

The refusal of the United States to pay the Indians the income from the lands selected by them without conflict from the dates of their respective selections constitutes an unlawful exclusion from said lands under 25 U. S. C. A., Section 345.

III.

The District Court did not err in judicially declaring that the right to a just share of the tribal waters is appurtenant to and accompanies each allotment of tribal lands and that it is the duty of the United States to apportion said waters in such manner as will secure for each plaintiff a just share thereof. (See 25 U. S. C. A., Sec. 381.)

ARGUMENT.

I.

The District Court Had Jurisdiction Under 25 U. S. C. A., Section 345, as Supplemented by 28 U. S. C. A., Section 2201, to Judicially Declare the Indians' Rights to Allotments in Severalty and to Equalize Said Allotments, to Declare the Indians' Rights to the Income From Lands Selected by Them Without Conflict From the Dates of Such Selections, and to Declare That Each Indian Is Entitled to a Just Share of Tribal Waters and That Such Right Is Appurtenant to His Land.

It should first be noted that the jurisdiction granted to the District Court by the Act of 1894, as amended (25 U. S. C. A., Sec. 345) is essentially equitable. This Court has so held in *Arenas v. Preston,* 181 F. 2d 62, 66, where, among other things, the Court said:

> "Appellant United States in the instant case makes practically the same argument as it made in the Equitable case. That is, that the court cannot apply the general rule, to wit: That a court of equity may settle incidental questions as well as fundamental questions, because the applicable statutes in this case do not specifically authorize it. It is also argued that as to our case the applicable statute (*i. e.,* 25 U. S. C. A., Sec. 345) does not authorize the impression of a lien upon the (restricted) property, because its foreclosure would have the effect of disposing of a part of the property. But the Supreme Court rejected the argument by saying that it was intended that the restrictions on the allotted land, *which apply as well to produce from the land,* should afford protection to the allottee, rather than to restrict courts of equity from giving such protection * * *

> "It seems to us that Congress could not have intended to commit the subject to its courts with any paralyzing limitation *but, in committing the subject to its courts it intended them to fully exercise their general equitable jurisdiction.*" (Emphasis added.)

The rule as above stated by this Court is in accord with the well recognized principle that a court of equity whose jurisdiction has been invoked for one purpose may determine all equities of the parties connected with the main subject of the suit, and equitable relief may thus be incidentally obtained even though the original bill would not lie for such relief alone.

> 30 C. J. S. 421, Sec. 68 of Equity and cases cited;
>
> *Sears v. Rule*, 27 Cal. 2d 131;
>
> *Hendrickson v. Bertelson*, 1 Cal. 2d 430;
>
> *Colorado Power Co. v. Pac. Gas & Elec. Co.*, 218 Cal. 559.

The argument of appellants here is essentially the same as that referred to in the *Arenas* case, *supra*. It is just as fallacious here as it was held to be there.

Since the District Court had equitable jurisdiction under Title 25 U. S. C. A., Section 345, which was properly invoked by plaintiffs-appellees, the general equity powers of that court could be, and were, exercised in declaring that they were entitled to the income from their duly selected lands, to equalization of their allotments with other allotments, and to a just share, each, of the waters of the reservation.

Section 345 of Title 25 U. S. C. A. is a codification of the Act of 1894 (28 Stat. 305), as amended by subsequent

Acts of Congress. (31 Stat. 760; 36 Stat. 1167.) Said section provides, in part, that

> "All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land * * * or who claim to be so entitled * * * *or who claim to have been unlawfully denied or excluded from any allotment or parcel of land* * * * may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States * * *" (Emphasis added.)

This section of the United States Code not only gives an Indian the right to sue the United States in the District Court in respect to his right to an allotment of land in severalty, but also gives him the right to sue the United States in said court for unlawfully denying or excluding him from the possession, use and enjoyment of any parcel of land to which he rightfully claims to be entitled. Many cases hold that the statute giving an Indian the right to sue the United States impliedly confers jurisdiction upon the District Court to hear and determine such suit, which, obviously, is equitable in its nature.

> *Hy-yu-tse-mil-kin v. United States,* 119 Fed. 114, aff. 194 U. S. 401;
>
> *Sloan v. United States,* 95 Fed. 193;
>
> *Morrison v. Work,* 266 U. S. 481;
>
> *Gerard v. United States* (9 Cir), 167 F. 2d 951;
>
> *United States v. Arenas,* 158 F. 2d 730.

In the *Gerard* case, *supra,* this court held that the District Court not only had jurisdiction of actions involving the right of an Indian to an allotment, but also of a suit by such an Indian to protect his allotment; and this court

further held in that case that the statutory right of the Indian to sue under Section 345 Title 25 U. S. C. A. "is broad enough to include the United States." (*Id.* 167 F. 2d 954.) In other words, the Indian's right to sue for his allotment, or to protect his interest therein, is broad enough to include permission to sue the United States.

The 1894 Act (25 U. S. C. A., Sec. 345), as amended, is not limited merely to granting jurisdiction to the District Court to hear and determine an Indian's right to an allotment. The jurisdiction conferred by the Act extends, by its express terms, to hearing and determining the claim of any Indian that he "has been unlawfully denied or excluded from any allotment or parcel of land." Suppose, for example, that an allotment has been made and a trust patent has been issued to an Indian, but he is prevented by the Bureau of Indian Affairs or by the Secretary of the Interior from taking possession of his land; or suppose he takes possession, but the Bureau will not pay him the rentals and income from his land. Can there be any doubt whatsoever as to his right to sue for a declaration of his right to such rentals and income? Surely, not.

In the *Gerard* case, *supra,* two Blackfeet Indians had been allotted lands and trust patents had been issued to them. Without their consent the Bureau, some four months later, issued patents in fee to said Indians, thereby subjecting their lands to taxation by the State of Montana. The Indians sued, under 25 U. S. C. A., Section 345, to have the patents in fee declared null and void, to have the sale for taxes set aside, and for a declaration that they had the right to the immediate possession of said lands and that the same are immune from taxation. Judgment was against the Indians in the District Court,

but was reversed by this court in an opinion by Chief Judge Denman.

In *Sully v. United States,* 195 Fed. 113, it was held that where the failure of an Indian to be enrolled and allotted land was due solely to the misconduct of an officer of the United States, the Circuit Court (now the District Court) had jurisdiction to grant relief, and relief was granted against the United States under the provisions of the Act of February 6, 1901 (31 Stat. 760), now incorporated in 25 U. S. C. A., Section 345. The suit was held to be in equity and the relief granted to be equitable.

In the *Lee Arenas* case (*United States v. Arenas,* 158 F. 2d 730; *Arenas v. Preston,* 181 F. 2d 62; *United States v. Preston,* 202 F. 2d 740) this court not only decided that Arenas was entitled to an allotment of and trust patent to the lands selected by him as declared by the District Court, but also that the District Court had jurisdiction to award attorneys' fees to Arenas' attorneys and to impress an equitable lien upon his allotted lands to secure payment of such fees, and also to order the sale of his restricted lands to satisfy said lien and judgment.

The cases referred to refute the contention of appellant that the jurisdiction of the District Court under Title 25 U. S. C., Section 345 is limited to a judicial declaration that an Indian is entitled to an allotment of duly selected land and that such jurisdiction is exhausted by making such judicial declaration. (App. Br. p. 23.)

In this connection it should be further noted that Section 345 of 25 U. S. C. A. partakes of the nature of a declaratory judgment statute, and that the District Court

has jurisdiction thereunder to make the adjudications complained of by appellant without reference to 28 U. S. C. A., Section 2201 (the Federal Declaratory Judgment Act). The latter Act is, however, also applicable under the facts of this case.

It is, of course, true that the Federal Declaratory Judgment Act (28 U. S. C. A., Sec. 2201) does not *create* jurisdiction where none previously existed. But the point has no importance on this appeal, since it plainly appears that the District Court had jurisdiction under 25 U. S. C. A., Section 345 to make the declaratory adjudications embraced in the judgment appealed from, for reasons more fully stated, *infra*.

The Jurisdiction of the District Court Continues Until the Allotment Process Is Completed.

Section 345 of Title 25 U. S. C. A. is clearly designed to give the District Courts jurisdiction to try and determine the right of any Indian to an allotment of land in severalty, and to adjudicate the right of any Indian to the possession of such land together with the fruits thereof. This conclusion is justified by the language of said section, by the objects and purposes for which it was enacted, and by the decisions of this court and other federal courts holding that the section is not limited solely to a judicial determination, in the abstract, that an Indian is entitled, by virtue of selection, to an allotment of a particular tract of land.

As the trial court found, the allotment process is not complete until an Indian allottee is placed in possession of

his selected lands with the unquestioned right to receive the income therefrom. Nor is the allotment process complete until the Indian allottee is allotted lands which, in total value, are reasonably equal to the lands allotted to each of the other members of the tribe. Nor is it complete until such Indian receives, or is declared to have the right to, a fair and just share of the waters of the Reservation. This is so, because the title of an Indian to lands duly selected by him for allotment is a full equitable title, and is vested in him as of the date of his selection. Nothing remains thereafter to be done except the ministerial act by the Secretary of issuing a trust patent to the allottee. Full equitable title to the land includes the right to the possession, use and enjoyment thereof, and also of all appurtenances thereto and of all fruits thereof.

> *First. Natl. Bank v. United States,* 59 F. 2d 367;
> *United States v. Whitmire,* 236 Fed. 474, 480;
> *United States v. Arenas,* 158 F. 2d 730, 750.

An appurtenance to real property "means and includes all rights and interests in other property necessary for the full enjoyment of the property conveyed." (6 C. J. S. 136.) An appurtenance to realty also means "that which might become necessarily connected with the full and free enjoyment of the particular premises," and "the right to the use of those things which are essential to the full enjoyment of the premises conveyed and which were used as necessary incidents thereto." (*Id.*)

The term "real property" is defined in the California Civil Code, Section 658, as

> "Land; that which is affixed to land; that which is incidental or appurtenant to land; (and) that which is immovable by law * * *"

It has been held to include water, oil, minerals and other things underlying land, hence ownership of land includes the right to the full use and enjoyment of the fruits thereof.

> 6 C. J. S. 136, *supra;*
>
> 22 Cal. Jur. 416, *et seq.,* and cases cited.

As said in 22 California Jurisprudence 416-417:

> " 'Real property' includes both land and things which are affixed to land. Mining claims, water courses, oil, growing timber, growing crops (under certain circumstances), buildings attached to the soil, and other substances so attached as to be considered in law a part thereof, are real property. Likewise things which are incidental or appurtenant to land are considered real property."

Title to real property includes "the right which a person has to the possession of property, or to the enjoyment thereof" (73 C. J. S. 205), and this is true whether the title be in fee simple, or equitable. (*Id.*)

The failure and refusal of the Secretary of the Interior to allot lands to appellees of equal value and to pay them the income from the lands selected by them for allotments was a violation and a denial of their rights under Section 345 of Title 25 U. S. C. A., and the District Court had jurisdiction to adjudicate such rights. Of necessity, this jurisdiction must continue until a complete adjudication is made and the allotment process is completed.

II.

The District Court Did Not Err in Declaring That Each Indian Plaintiff Is Entitled to the Income From His Duly Selected Land From the Date of Selection, Because Such Indian Becomes the Equitable Owner of the Selected Land From Date of Lawful Selection, and Thereafter Tribal Ownership of and Rights Therein Cease.

Appellant contends, in substance, that the tribal ownership of lands selected for allotment by individual members of the tribe continues until the selections are approved and trust patents are issued, hence the Band is a necessary party to this action. This is not the law.

For nearly a century it has been well settled that where an individual in the prosecution of a right does everything which the law requires of him to do, and fails to attain this right by reason of the misconduct or neglect of a public officer, the law will protect him by considering as done that which ought to have been done.

> *Lytle v. Arkansas*, 9 How. 314;
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> *Hy-yu-tse-mil-kin v. Smith*, 194 U. S. 401;
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> *United States v. Whitmire*, 236 Fed. 474;
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> *Smith v. Boniface*, 132 Fed. 889, 891;
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> *Barney v. Dolph*, 97 U. S. 652;
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> *Ballinger v. United States*, 216 U. S. 240;
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> *United States v. Payne*, 284 Fed. 827;
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> *Payne v. New Mexico*, 255 U. S. 367;
>
> *Wyoming v. United States*, 255 U. S. 489;
>
> *Payne v. Central Pac. Ry. Co.*, 255 U. S. 228.

This principle has been applied to entrymen of public lands, to Indians who have made lawful selections of land for allotment in severalty, and others in similar situations.

> "This rule is based on the theory that by virtue of his compliance with the requirements, he (a claimant to public land) has an equitable title to the land; that in equity it is his and the Government holds it in trust for him although no *legal* title passes until patent issues. (Citing cases.) *It would seem to follow that what is true concerning the equitable rights of an entryman to public land is also true as to the equitable rights of a qualified Indian to an allotment of tribal or reservation land. In fact, the position of a qualified Indian is stronger than that of an entryman of public land, for the reason that he has an inherent interest in the common property of his tribe."* (Raymond Bear Hill, 52 L. D. 68.) (Emphasis added.)

In *United States v. Whitmire,* 236 Fed. 474, at page 480, the Court said:

> "The fact that no patent had been issued to Whitmire (an allottee) when he made the conveyance to Greenlees is immaterial. When the right to a patent has once become vested under the law, it is the equivalent, so far as the government is concerned, to a patent actually issued. Citing:
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> *Simmons v. Wagner,* 101 U. S. 260;
>
> *Deffeback v. Hawke,* 115 U. S. 392;
>
> *Hedrick v. Railroad Co.,* 167 U. S. 673;
>
> *Wallace v. Adams,* 143 Fed. 716, aff. 204 U. S. 415.

In *United States v. Arenas,* 158 F. 2d 730, at page 750, this court said:

> "We therefore hold that the appellee (Lee Arenas) has acquired an equitable title to the lands covered by his selection for allotment and the certificate therefor issued by Wadsworth * * * (and) an allotment trust patent to the lands covered by his certificate should be issued to him by the United States [R. 24, 158-160] *as of the date of the schedule of selections for allotment, May 9, 1927.*" (Emphasis added.)

Apparently, appellant contends that an Indian can acquire no rights in lawfully selected lands until a trust patent thereto is issued to the Indian. This contention not only ignores such Indian's equitable title to the selected land as of the date of selection, but also ignores the fact that appellant, as trustee, holds the trust property and all fruits and income therefrom in trust for the beneficiary Indian.

It is a general rule that

> "* * * trustees * * * are chargeable in their accounts with the whole of the estate committed to, or received by, them, or which has actually come into their possession, custody, or control, *including the net income, product, or rents and profits arising from the trust res.*" (90 C. J. S. 692, Sec. 384 of Trusts.) (Emphasis added.)

Appellant quotes portions of Sections 5 and 8 of the Mission Indian Act (its brief, pp. 36-37) to sustain its contention that plaintiffs are not entitled to the income from their selected lands until trust patents are issued to them, respectively. But the provisions quoted have no application where the Secretary of the Interior fails and

refuses to issue the trust patent with reasonable promptness. This court held in the *Lee Arenas* case that the Secretary should have issued the trust patent to Arenas on May 9, 1927, which was the approximate date of his selection. Why? Because, undoubtedly, the trust patent should follow promptly the lawful selection. And, this court no doubt realized that the Secretary should not be permitted to withhold a trust patent for many years, collect the income from lawfully selected lands, and then refuse to pay such income to the equitable Indian owner on the ground that no patent had issued by reason of the Secretary's failure and refusal to perform his ministerial duty. Such a concept is contrary to reason, justice, and the many decisions of the federal courts cited, *supra*.

Appellant cites *United States v. Reynolds,* 250 U. S. 104, 109, in this connection. But that case merely holds that a restricted Indian cannot alienate his allotted lands during the trust period of tweny-five years and the lawfully extended period of ten years. It may be noted that the Indian's selection of land was approved by the Secretary on September 16, 1891, and trust patent was issued on February 6, 1892, about five and one-half months later. Moreover, the question whether the Government could lawfully withhold from the Indian selector the income from his lands after a lawful selection was not involved in that case.

Appellant suggests that there is involved herein a question of adjusting equities between plaintiffs and the tribe. This means, if anything, that all other members of the

Band were entitled to and were given trust patents immediately after filing their selections and to the income therefrom at all times thereafter, but that plaintiffs must wait for years to receive trust patents. It also means that plaintiffs-appellees, now three in number, must share the income from their lawfully selected lands from dates of selections to dates of trust patents with all other members of the Band, almost one hundred in number. This naked statement is, alone, sufficient to explode the theory of adjusting equities, or even that any equities exist as between plaintiffs and the Band.

Appellant thus ignores the well-settled rule of equity that

> "When the right to a patent has once become vested under the law, it is the equivalent, so far as the government is concerned, to a patent actually issued." (*United States v. Whitmire,* 236 Fed. 474, 480.) See also:
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> *Simmons v. Wagner,* 101 U. S. 260;
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> *Deffeback v. Hawke,* 115 U. S. 392;
>
> *Hedrick v. Railroad Co.,* 167 U. S. 673;
>
> *Wallace v. Adams,* 143 Fed. 716, aff. 204 U. S. 415; and many other cases cited, *supra.*

It may be added that if the Secretary of the Interior may withhold trust patents, as here, for many years and claim thereby the right to deprive Indians of the income from their lawfully selected lands, abuses of power and discretion will not only continue but will multiply and increase under practices followed by him in the allotment of lands to the Agua Caliente Indians.

III.

The District Court Did Not Err in Declaring That Each of the Indian Plaintiffs Is Entitled to a Just Share of the Waters of the Reservation, That His Right Thereto Is Appurtenant to His Land, and That It Is the Duty of the United States to Apportion Tribal Waters Among the Several Members of the Band.

Appellant insists that even if the District Court had jurisdiction to declare that each Indian plaintiff is entitled to a just share of the waters of the Reservation, it erred in holding that it is the duty of the Secretary of the Interior to apportion such waters among the Indians entitled thereto. The real reason advanced for this anomalous position is that the alleged discretion of the Secretary cannot be disturbed by a judgment of the court.

It must be remembered that allotments in severalty to the members of the Agua Caliente Band of Mission Indians consisted, for each Indian, of (1) a two-acre tract of land suitable for business; (2) a five-acre tract of irrigable land; and (3) a forty-acre tract of desert, or non-irrigable land. The three kinds of land were by the Secretary ordered made to each Indian. [R. 28-34.]

It should also be remembered that the waters of the Agua Caliente Reservation do not uniformly occur in all parts of the Reservation lands, but only in a few areas thereof. The Reservation lands also consist of even numbered sections, and the area in which they are situated is thereby of a checkerboard character. In view of these facts, a judicial declaration of the right of each Palm Springs Indian to a just share of the tribal waters and that such right is appurtenant to his land assumes added importance amounting to necessity if he is to have the

value, use and enjoyment of the irrigable land. Notwithstanding these facts, the Secretary has never taken any action in reference to the waters of the Reservation in the respects mentioned. [R. 134, Finding XX.]

The right of an Indian allottee to a just share of tribal waters cannot reasonably be questioned.

> *United States v. Powers,* 305 U. S. 527, 532;
> *Winters v. United States,* 207 U. S. 564;
> *United States v. McIntire,* 101 F. 2d 650;
> 25 U. S. C. A., Sec. 381;
> 42 C. J. S. 700, *et seq.,* Sec. 31 of Indians.

This legal right, under the circumstances of this case, is a proper subject for a declaratory judgment. Since Reservation waters, under general rules of law, are appurtenant to the Reservation lands, it is difficult to understand why the court, in declaring the Indians' rights to allotments of such lands, cannot also declare their rights to all appurtenances thereto, including waters.

Moreover, in respect to Reservation waters, the United States is trustee holding title for the members of the tribe, and the trustee-*cestui que trust* relationship continues, and applies to the individual Indian as to his land, after an allotment in severalty is made to him.

> *United States v. Powers, supra;*
> *United States v. McIntire, supra;*
> 43 C. J. S. 700, *et seq., supra.*

An Indian allottee's right to a just share of tribal waters, and to an apportionment thereof under such facts as exist in this case, is implicit in 25 U. S. C. A., Section 381; and the Secretary's failure to make adequate pro-

vision therefor in the allotment proceedings herein constituted an abuse of official discretion, if he had any. Section 381, *supra,* provides:

> "In the cases where the use of water is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservation * * *"

Appellant construes Section 381, *supra,* to mean that the Secretary has uncontrolled, and uncontrollable, discretion to apportion, or to refuse to apportion, the waters of the Agua Caliente Reservation. Appellees say no such uncontrollable discretion exists, or has ever existed. That the Secretary has a measure of discretion in the apportionment of the waters of an Indian Reservation under Section 381, *supra,* is not denied; but his discretion does not extend to a failure and refusal to make such apportionment of water for the irrigation of lands, admitted and declared by him to be irrigable, for more than six years after allotment thereof in severalty. This is precisely what he has done in respect to the lands of the Agua Caliente Reservation.

The judgment of the District Court declares [R. 145]:

> "That the right to a just share of the tribal waters is appurtenant to and accompanies each allotment of tribal lands, and plaintiffs are entitled to have apportioned, and it is the duty of United States of America to apportion, the waters upon the Reservation of said Band of Indians in such manner as will secure for each plaintiff a just share of the tribal waters." (Par. II.)

An Indian allottee is, by the express provisions of the statute (25 U. S. C. A., Sec. 381) entitled to a just and equal share of the tribal waters. Apparently, appellant objects to a judicial declaration that such Indian has the right conferred by statute.

The judgment below declares that it is the duty of the United States to apportion the tribal waters of the Agua Caliente Reservation. Can there be any doubt as to such duty under the facts of this case? Of course, not. The District Court found, in this connection, that

> "The evidence shows that the Secretary has been remiss in performance of the duty imposed upon him by law, not only in the allotment of the land proper to the Agua Caliente Band of Mission Indians, but also by his failure even until now to allot water rights appurtenant thereto * * *"

The remissness in the performance of his duty by the Secretary, as above found, at the date of the judgment, had continued from January 1949, to September 29, 1954 (more than five years), and by the admissions in appellant's brief still continues. Is there no remedy for such a gross abuse of discretion, if he had any? Of course there is a remedy, and jurisdiction is vested in the District Court by 25 U. S. C. A., Section 345 and 28 U. S. C. A., Section 2201, to declare such abuse of discretion and to adjudicate the right of the Indian allottee to a just and equal share of the tribal waters.

Cf. 25 U. S. C. A., Sec. 323.

If appellant's contentions in respect to the Secretary's claimed uncontrollable discretion in the apportionment of tribal or reservation waters should be upheld, then it logically follows that he could refuse forever to make a

necessary apportionment of such waters. In that event, lands allotted as irrigable could and would be made as arid as those declared to be and allotted as arid lands.

Moreover, the Secretary's failure and refusal to apportion the waters of the Reservation violates the right of each Indian to a full and complete allotment of land in severalty and constitutes an exclusion of him from his selected lands to the extent of such denial. It is conceivable that an Indian allottee might be wholly dependent for a living upon the fruits of the irrigable portions of his allotment. In such event, could it be reasonably contended that such Indian could not litigate his right to a just and equal share of the waters of the reservation under 25 U. S. C. A., Section 345? The answer is obvious, for under those circumstances such Indian, because he has been "unlawfully denied or excluded from any allotment or parcel of land" to which he is entitled, "may commence and prosecute or defend any action, suit, or proceeding in relation" thereto. (25 U. S. C. A., Sec. 345.) Thus, discretion, if any, must yield to the statute.

In its comment on 25 U. S. C. A., Section 381, appellant states (its brief, p. 43) "this statute plainly contemplates merely the 'distribution' of water and not its 'apportionment.' " This is splitting hairs that do not exist. The meaning of the words "distribution" and "apportionment" is the same.

Webster's International Dictionary defines "apportionment" as follows:

> "The division of rights or liabilities among several persons entitled or liable to them in accordance with their respective interests * * *"

The verb "apportion" is defined to mean

> "To divide and assign in just proportion; to divide and distribute proportionately; to make an apportionment of; to allot * * *"

The word "distribution" is defined as the

> "Act of distributing; apportionment among several or many; as, distribution of gifts."

The judgment of the District Court in this behalf goes no further than to declare

> "That the right to a just share of the tribal waters is appurtenant to and accompanies each allotment of tribal lands, and plaintiffs are entitled to have apportioned, and it is the duty of United States of America to apportion, the waters upon the Reservation of said Band of Indians in such manner as will secure for each plaintiff a just share of the tribal waters."

There can be no doubt that the District Court correctly declared the law in respect to the waters of the Agua Caliente Reservation, and in respect to the duty of the United States to make an apportionment (*i. e.,* distribution, division) thereof among the members of the Band.

This court, in *United States v. Powers,* 94 F. 2d 783, construed Section 381 of Title 25 U. S. C. A., *supra,* to mean under the facts of that case that

> "* * * the Secretary of the Interior was authorized to prescribe rules and regulations *to secure the just and equal distribution of said water among the Crow Indians,* but he was not authorized, by rule, regulation, or otherwise, to deprive any allottee or patentee of lands in the Crow Reservation, or the successor in title of any such allottee or patentee, of his just and equal right to the use of said waters." (*Id.,* p. 786.) (Emphasis added.)

The word "duty" does not appear in the quoted statement, *supra,* but, we submit, is implicit therein. Certainly, this court's statement, *supra,* is authority for the proposition that each and every member of the Agua Caliente Band of Indians is entitled to a just and equal distribution of the waters of the Reservation, and that this right is appurtenant to his allotment.

Appellant's position, as set forth in its brief, intimates that only the plaintiffs are interested in the judgment in this case. This is incorrect. The whole Band of the Agua Caliente Indians, as a class, is interested in the District Court's judicial declaration in respect to the rights of said Indians in and to the waters of the Reservation, in the income from their allotted lands, and in the equalization of their allotments. Any decision below, or here, adverse to the plaintiffs in respect to waters, income, and equalization of allotments would affect *all* members of the Band. The judgment herein affords protection alike to each and all members of the Band in the respects and as to the matters hereinabove mentioned and set forth. The judgment should be affirmed.

Conclusion.

Appellees, therefore, respectfully submit that the District Court committed no error in its judgment and that it should be affirmed.

Respectfully submitted,

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